INTERKOL (M) SDN BHD

v.

BANDAR UTAMA CITY PROMENADE SDN BHD & ANOR

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[SUMMONS NO: MT1-22-172-1998]
16 APRIL 1998

CIVIL PROCEDURE: *Injunction - Interlocutory injunction, application for - Whether there were serious issues to be tried - Whether justice of the case lay in favour of granting the injunction - Whether plaintiff was entitled to equitable remedy*

CIVIL PROCEDURE: *Injunction - Interlocutory injunction, application for - To order defendants to give possession of premises to plaintiff - Whether nature of injunction sought for was mandatory*

CIVIL PROCEDURE: *Injunction - Interlocutory injunction, application for - To restrain defendants from removing plaintiff's chattels - Whether there was evidence that defendants would remove chattels*

CIVIL PROCEDURE: *Injunction - Interlocutory injunction, application for - To restrain defendants and bailiff from proceeding with writ of distress - Whether plaintiff succeeded in showing that distress proceedings were invalid*

CIVIL PROCEDURE: *Injunction - Interlocutory injunction, application for - Application against bailiff from proceeding with distress proceedings - Whether such an application can be made against a bailiff - Whether bailiff will be restrained from carrying out his statutory duties - Government Proceedings Act 1956, s. 29(1), (2)*

CIVIL PROCEDURE: *Injunction - Interlocutory injunction, application for - Damages - Whether plaintiff would be able to honour undertaking as to damages - Whether defendants would be able to satisfy damages - Whether factors were in favour of granting injunction*

The plaintiff, a tenant of the 1st and 2nd defendants ('the defendants'), had defaulted in the payment of rents in respect of various premises of the defendants under two tenancy agreements ('the tenancy agreements').

In this instance, the plaintiff sought the following prayers: (a) to allow the plaintiff to enter the premises therein; (b) to prevent the defendants from removing the plaintiff's goods from the said premises; (c) to prevent the

defendants from proceeding with the Writ of Distress until the trial of this suit; and (d) to prevent the bailiff from proceeding with the Writ of Distress until the trial of this suit.

Held:

[1] The judge when hearing an application for an interlocutory injunction, firstly, must ask himself whether the totality of the facts presented before him discloses a *bona fide* serious issue to be tried. Secondly, after having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies (*Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors*). The judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the *status quo*.

[2] Upon a proper perusal of the various affidavits filed herein, this court found *bona fide* issues to be tried.

[3] The plaintiff's right to enjoy quiet possession without interruption was at all material times subject to the plaintiff having paid the rents due. Any apparent waiver or indulgence, which was denied by the defendants, did not constitute a waiver or prejudice to the defendants' rights under the tenancy agreement. The plaintiff was seeking equitable remedy in the form of an injunction and therefore, he must do equity before he was in a position to obtain equitable remedy by way of an injunction.

[4] The effect of prayer (a) sought by the plaintiff was in the nature of a mandatory injunction ordering the defendants to give possession of the premises to the plaintiff. Further, this prayer was ambiguous in the sense that the premises were not definitive. The effect of this prayer was tantamount to a final remedy and the plaintiff had not met with the test *(Kuala Reman Estates Bhd v. Faber Merlin Malaysia Bhd* and *Roxy Electric Industries (M) Bhd v. Syarikat Nominee Bumiputra Sdn Bhd).*

[5] By prayer (b), the plaintiff sought an interim injunction to restrain the defendants from removing the plaintiff's chattels from the premises. Again, in this prayer, the plaintiff had not defined the premises precisely. There was no evidence or allegation by the plaintiff suggesting that the defendants, their servants or agents were removing or intend to remove the plaintiff's chattels.

[6] By prayers (c) and (d), the plaintiff was effectively asking this court to restrain the continuation of the distress proceedings, but the plaintiff had failed to show how and why the distress proceedings were invalid. Even if the distress proceedings were unlawful, the plaintiff's remedy, if any, against the defendants would lie in damages which would be an adequate remedy.

[7] The plaintiff had not paid the rent and it was not shown to be a company which was in a position to fulfil the undertaking as to damages. The plaintiff's undertaking as to damages was insufficient.

[8] By prayer (d), the plaintiff sought an interim injunction against the bailiff from proceeding with the distress proceedings. Section 29(1) and (2) of the Government Proceedings Act 1956 operates as an absolute bar to the application of an injunction against the bailiff as a government officer. Further, the effect of prayer (c) was to seek an injunction against the defendants from proceeding to enforce a Writ of Distress which was issued pursuant to a valid court order. This had an indirect effect of restraining the bailiff (and indirectly the government) from carrying out his statutory duties, and this was barred by s. 29 above.

[9] The plaintiff's submission that the outstanding rentals do not constitute an issue was completely devoid of merits and could not be upheld at all.

[10] Another factor that weighed heavily against granting the injunction was that damages would be an adequate remedy as the defendants being the owners of the demised premises were in a position to satisfy the remedy of damages in the event the plaintiff succeeded in the full trial in due course. Further, there was every possibility or likelihood that the plaintiff would not be able to honour the undertaking as to damages should the court conclude after full hearing that the plaintiff was indeed not entitled to the injunction.

[Applications dismissed.]

Cases referred to:

Cheah Theam Swee & Anor v. Overseas Union Bank Ltd & Ors [1989] 1 CLJ 157 ***(refd)***

Government Of Malaysia v. Lim Kit Siang; United Engineers (M) Berhad v. Lim Kit Siang [1988] 1 CLJ 219 ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor Bin Abdullah & Ors [1995] 1 CLJ 293 ***(foll)***

Kuala Reman Estates Bhd v. Faber Merlin Malaysia Bhd [1989] 2 CLJ 625 ***(refd)***

Roxy Electric Industries (M) Bhd v. Syarikat Nominee Bumiputra Sdn Bhd [1989] 2 CLJ 657 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 3, (1)
Courts of Judicature Act 1964, s. 12(3)
Government Proceedings Act 1956, s. 29, (1), (2)
Subordinate Courts Act 1948, ss. 106, 107(3)

For the plaintiff - Joy W Appukuttan; M/s Kitson Foong & Assoc
For the defendants - K Kirubkaran; M/s Kiru & Yong

Reported by Kavitha Gunasegaran

JUDGMENT

Low Hop Bing J:

Application

Plaintiff's application in encl. (6) seeks, *inter alia*, the following interlocutory relief:

(a) An interim injunction against the defendants to allow the plaintiff to enter the premises identified therein;

(b) An interim injunction against the defendants to prevent the defendants from removing the plaintiff's goods from the said premises;

(c) To prevent the defendants from proceeding with the Writ of Distress No. 54-7-98 until the trial of this suit; and

(d) To prevent the bailiff of the Shah Alam Subordinate Courts from proceeding with the Writ of Distress No. 54-7-98 until the trial of this suit.

Facts

The plaintiff is the tenant of the 1st and 2nd defendants in respect of various premises under two tenancy agreements of even date. Under the 1st tenancy agreement, the plaintiff rented premises known as R3 together with premises known as the promenade. In respect of the 1st tenancy agreement, the 1st and 2nd defendants are the joint landlords. The agreed monthly rent payable is RM100,000 or 10% of the plaintiff's gross sales turnover, whichever is the higher. In respect of the 2nd tenancy agreement, the plaintiff rented from the 2nd defendant premises to house the plaintiff's main kitchen, office and store-room for the plaintiff's business under the 1st tenancy agreement.

Functions Of Judge In An Application For Interlocutory Injunction

The functions of a judge hearing an application for an interlocutory injunction have been succinctly set out by Gopal Sri Ram, JCA in delivering the judgment of the Court of Appeal in *Keet Gerald Francis Noel John v. Mohd Noor Bin Abdullah & Ors* [1995] 1 CLJ 293; [1995] 1 MLJ 193, at p. 206 as follows:

> (1) he must ask himself whether the totality of the facts presented before him discloses a *bona fide* serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry;
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> (2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, *inter alia*, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the Plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the Plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse the relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge would be entitled to dispense with the usual undertaking as to damages (see *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90). Apart from such cases, the judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee; and
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> (3) the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper

and intended to maintain the *status quo*, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd v. Milk Marketing Board* [1984] AC 130; [1983] 2 All ER 770; [1983] 3 WLR 143 and applied in *Cheng Hang Guan*. It is a judicial discretion capable of correction on appeal. Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

Serious Issues To Be Tried

Upon a proper perusal of the various affidavits filed herein, I find the following *bona fide* issues to be tried:

(1) Were there representations made by the defendants to the plaintiff as to the "ambience" on the promenade and as to the completion of the defendants' related companies to develop their office block and a hotel?

(2) Whether the plaintiff is estopped from raising the issues of representation when the two tenancy agreements are silent of such representations?

(3) Was there an agreement to reduce the rent of the premises under the 1st tenancy agreement prior to 1 December 1997?

(4) Was there an agreement by the plaintiff to cease business in the premises known as lower ground floor of R3 (barnums) and KR2 known as Mahi-Mahi and to surrender possession of the same to the defendant after 31 January 1998?

(5) Did the defendants take legal possession of the premises known as Barnums and Mahi-Mahi on 2 February 1998 and if so, was legal possession surrendered to the plaintiff on 2 March 1998, when the keys were returned to the plaintiff''s solicitors?

(6) Was the distress proceeding by the defendants against the plaintiff valid and was the bailiff of the Sessions Court entitled to secure the premises in the course of the distress?

Since there are serious issues to be tried, it is necessary for me to consider where the justice of the case lies.

Justice Of The Case

Distress Suit

The bailiff in executing the distress proceeding in Shah Alam Sessions Court Distress No. 54-7-98 is conferred with certain powers to break open any outer or inner door of a building using such force as is reasonably necessary to effect the entry: Section 12(3) of the Courts of Judicature Act 1964. In this case, legal possession of the premises was in the hands of the plaintiff when the defendants moved the bailiff to execute the writ of distress. At the time of execution of the writ of distress, neither the plaintiff nor its representatives were present. The bailiff was therefore left with no other alternative but to use his powers to forcibly enter the premises with the aid of a locksmith to remove the locks that secured the doors to the premises. The bailiff then proceeded to secure the premises with new locks and the keys are presently with the bailiff.

It is a term of the 1st tenancy agreement, that the plaintiff as tenant shall pay the rent for each month in advance. Since the plaintiff as tenant never achieved the gross monthly sales turnover to warrant a variable rent to the higher than the monthly base rent of RM100,000 the plaintiff as tenant is obliged to pay the monthly rent of RM100,000 in advance each monthly whether demanded or not. The plaintiff's right to enjoy quiet possession without interruption was at all material times subject to the plaintiff having paid the rents due.

In any event, any apparent waiver or indulgence, which is denied by the defendants, does not constitute a waiver or prejudice to the defendants' rights under the 1st tenancy agreement. The plaintiff is seeking equitable remedy in the form of an injunction and therefore he must first do equity before the plaintiff is in a position to obtain equitable remedy by way of injunction.

Mandatory Injunction – Justice Of The Case

The effect of prayer (a) sought by the plaintiff is in the nature of a mandatory injunction ordering the defendant to give possession of the premises to the plaintiff. Further, this prayer is ambiguous in the sense that the premises are not definitive. The premises that form the subject matter of this application are the lower ground floor of R3 and KR1, but the defendants were not in possession of the said two premises. In any event, the effect of this prayer is tantamount to a final remedy and the plaintiff has not met with the test: *Kuala Reman Estates Bhd v. Faber Merlin Malaysia Bhd* [1989] 2 CLJ 625; [1989] 3 MLJ 292 and *Roxy Electric Industries (M) Bhd v. Syarikat Nominee Bumiputra Sdn Bhd* [1989] 2 CLJ 657; [1989] 3 MLJ 231.

By prayer (b), the plaintiff seeks an interim injunction to restrain the defendants from removing the plaintiff's chattels from the premises. Again, in this prayer, the plaintiff has not defined precisely the premises. There is no evidence or allegation by the plaintiff suggesting that the defendants, their servants or agents were removing or intend to remove the plaintiff's chattels. In any event, the plaintiff is not in possession of the premises, as indeed, the bailiff is in possession and it is unlikely for the plaintiff to remove the chattels which are now subject to the distress: See *Keet Gerald Francis Noel John v. Mohd Noor @ Harun b. Abdullah* [1995] 1 CLJ 293; [1995] 1 AMR 373.

By prayers (c) and (d), the plaintiff is effectively asking this court to restrain the continuation of the distress proceedings, but the plaintiff has failed to show how and why the distress proceeding is invalid.

In any event, even assuming for the moment that the distress proceeding was unlawful in the light of the plaintiff's own admission that it had ceased business operations, the plaintiff's remedy, if any, against the defendant would lie in damages which would be adequate remedy. The plaintiff is therefore not entitled to the injunction sought in prayers (c) and (d), applying the principles in *Keet Gerald, supra*.

The plaintiff has not paid the rental and is not shown to be a company which is in a position to fulfil the undertaking as to damages. The plaintiff's undertaking as to damages is insufficient: *Cheah Theam Swee & Anor v. Overseas Union Bank Ltd & Ors* [1989] 1 CLJ 157; [1989] 1 MLJ 426.

Section 29 Government Proceedings Act 1956

Section 29 of the Government Proceedings Act 1956, where relevant to this judgment reads as follows:

> 29(1). In any civil proceedings by or against the Government the court shall … have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:
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> Provided that –
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> (a) …
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> (b) …; and
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> (c) The court shall not in any civil proceedings grant any injunction … if the effect of granting the injunction … would be to give any relief against the Government which could not have been obtained in *proceedings against the Government*.

Section 29(2) of the same Act, where relevant to the facts herein, reads:

> (2) The Court shall not in any civil proceedings grant any injunction … if the effect of granting the injunction … would be to give any relief against the Government which could not have been obtained in proceedings against the Government.

By prayer (d) of encl. (6), the plaintiff seeks an interim injunction against the bailiff of the Sessions Court in the Distress Suit from proceeding with the distress proceedings.

The bailiff of the Sessions Court is a public officer of the Subordinate Courts appointed pursuant to s. 106 of the Subordinate Courts Act 1948.

Section 107(3) of the Subordinate Courts Act 1948 provides a statutory protection for the bailiff who is entrusted with the duty of executing a warrant of distress. The protection is not available if the bailiff knowingly acts in excess of the authority conferred upon him by the Writ of Distress. He is deemed not to have acted knowingly in excess of his authority merely by reason of knowing of the existence of a dispute as to ownership of the property so seized.

In the circumstance, I am of the view that the bailiff is an officer of the court and not an agent of the plaintiff as is the position in England. Section 3 of the Civil Law Act 1956 only allows the import of the English Common Law and Equity subject to the saving provisions in the beginning of s. 3(1) of the Civil Law Act 1956 and the proviso of the same section.

Section 29(1) and (2) of the Government Proceedings Act 1956 operates as absolute bar to the application of an injunction against the bailiff as a government officer: See majority judgment of Tun Salleh Abas, LP (as he then was), Tan Sri Abdul Hamid b. Omar, CJ (as he then was) and Tan Sri Hashim Yeop A. Sani, SCJ (as he then was) in *Government Of Malaysia v. Lim Kit Siang; United Engineers (M) Berhad v. Lim Kit Siang* [1988] 1 CLJ 219; [1988] 2 MLJ 12.

Further, the effect of prayer (c) in encl. (6) is to seek an injunction against the defendant from proceeding to enforce a writ of distress which was issued pursuant to a valid court order. This indeed has an indirect effect of restraining the bailiff and indirectly the government from carrying out his statutory duties and is barred by the express provisions of s. 29 above.

Injunction As A Discretionary Remedy

The discretion to grant or refuse an injunction is a judicial discretion which must be exercised in accordance with established judicial principles. The

plaintiff has admittedly failed to pay the outstanding rentals *viz* RM100,000 per month from 1 November 1997 to 30 November 1997 and all subsequent months at RM100,000 per month before filing this application. It has been submitted for the plaintiff that the outstanding rentals are not in issue here. It is exceedingly difficult for any reasonable man to accept this submission as having any merits at all. The premises which form the subject matter of these proceedings *viz* the plaintiff's application for injunction and the defendant's distress proceedings against the plaintiff in the Shah Alam Sessions Court revolve around one and only one matter i.e. the non-payment of rental by the plaintiff as tenant to the defendant as the landlord. If there had been prompt payment of all the outstanding rentals by the plaintiff to the defendant, there would have been nothing to litigate upon. I therefore hold that the plaintiff's submission that the outstanding rentals do not constitute an issue is completely devoid of merits and cannot be upheld at all.

Another factor that weighs heavily against granting the injunction here is that damages would be an adequate remedy and the defendants being the owner of the demised premises are in a position to satisfy the remedy of damages in the event the plaintiff succeeds in the full trial in due course.

Yet another factor that militates against granting the injunction is the failure or inability of the plaintiff to pay all outstanding rentals which led to these proceedings. This scenario no doubt would immediately give rise to the impression that there is every real possibility or likelihood of the plaintiff's inability to honour the undertaking as to damages for the purposes of granting the injunction should the court come to a final conclusion after full hearing that the plaintiff is indeed not entitled to the injunction.

Conclusion

Upon a careful consideration of the above principles, I am of the view that the facts of the case do not support the granting of the injunction to the plaintiff. In the circumstances, the plaintiff's application in encl. (6) herein and the plaintiff's application to set aside the writ of distress in the Shah Alam Sessions Court (and consolidated with the present application) are hereby dismissed with costs.